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Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF FLORIDA
Petitioner,

v.

ROBERT STRONG,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

AND APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

WHETHER A RADIO DISPATCH WHICH IS CORROBORATED BY A LAW ENFORCEMENT OFFICER'S CONTEMPORANEOUS INVESTIGATION CAN BE A PROPER BASIS FOR DETERMING THE NEED FOR EXECUTING A PROTECTIVE SEARCH.

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TABLE OF CITATIONS

OTHER AUTHORITIES CITED

OPINIONS BELOW

The opinion of the Florida Second District Court of Appeal in Strong v. State, 495 So.2d 191 (Fla. 2 DCA 1986), is reproduced in the appendix at A-1 - A-8.

JURISDICTION

On August 13, 1986, the Florida Second District Court of Appeal rendered an opinion reversing the respondent's judgment. A timely petition for discretionary review in the Florida Supreme Court was denied on January 22, 1987, and this Petition for Writ of Certiorari was filed within sixty (60) days of that date. The jurisdiction of this Honorable Court is invoked pursuant to Title 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV of the Constitution of the United States provides that:

> The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, §12, of the Constitution of the State of Florida provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interceptions of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as

interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The respondent, Robert Strong, was charged by information with carrying a concealed firearm. Respondent filed a Motion to Suppress the handgun taken from his person. After an evidentiary hearing on the Motion to Suppress, the trial court denied the motion. After obtaining a ruling that the Motion to Suppress was dispositive of the case, respondent entered a plea of nolo contendere and reserved the right to appeal the denial of his Motion to Suppress.

Respondent took an appeal to the Florida Second District Court of Appeal. The Florida Second District Court of Appeal reversed the trial court's judgment on the ground that the stop and the patdown of the respondent were unlawful since there was no reasonable grounds to believe that the respondent was armed and dangerous. The factual basis for this opinion was set forth in the opinion of the Florida Second District Court of Appeal as follows:

> At the hearing on the motion, the officer testified that he had received a dispatch that an anonymous caller had stated that there was a black male wearing dark clothing with a handgun at a particular convenience store. When the officer arrived at the store two to three minutes later, he saw two black males sitting on the curb. Because appellant's clothing was darker than the other black male's clothing, the officer approached appellant and asked if he had a gun. Appellant stated he did not, but the officer asked him to stand up for a pat-down. The pat-down revealed a small handgun in appellant's rear pocket. The officer then placed appellant under arrest.

The petitioner sought review of the Florida Second District Court of Appeal's opinion in the Florida Supreme Court. The Florida Supreme Court denied the petition for review on January 22, 1987. It is from this posture the petitioner seeks review before this Honorable Court.

REASONS FOR GRANTING THE WRIT

THE FLORIDA SECOND DISTRICT COURT OF APPEAL'S DECISION SUBJECTS LAW ENFORCEMENT TO A HIGH DEGREE OF RISK OF DEATH OR SEVERE BODILY INJURY.

In Terry v. Ohio, 392 U.S. 1 (1968), this Court held that the propriety of a stop and frisk depended upon the balancing of two competency interests: the governmental interest of safe and effective law enforcement, and the individual's interest in freedom from unreasonable searches and seizures as guaranteed by the Fourth Amendment:

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual , regardless of whether he has probable cause to arrest the individual for a crime. The officer need

> not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1964); Brinegar v. United States, 338 U.S. 160, 174 - 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949); Stacey v. Emery, 97 U.S. 642, 645, 24 L.Ed. 1035 (1878). And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inference which he is entitled to draw from the facts in light of his experience. Cf. Brinegar v. United States, supra.
>
> Terry v. Ohio, supra at 392 U.S. 27

In its decision rendered in the instant cause, the Florida Second District Court of Appeal concluded that since the radio dispatch the officer was responding to was from

an anonymous tip and the appellant only fit a general description, there could be no reasonable basis for the officer to believe that his safety or others was in danger.

There can be no doubt that when the officer received the dispatch, he had a duty to respond to the scene. Anything less would have been no response at all. Upon arriving two or three minutes after the dispatch, the officer approached the only person fitting the description of the dispatch. In such a setting, the Florida District Court's opinion does not allow the investigating officer to rely upon a contemporaneous radio dispatch that a person of respondent's general description at that exact place and at almost that exact time as being reasonably relied upon by a duty bound law enforcement officer. Such inability to rely on initial dispatches in a rapid pace response to a potentially high risk situation leaves law

enforcement with no practical method of mitigating risk prior to actual brandishment of the weapon by a suspect. Such a rule does not balance the competing interests, but rather, leaves law enforcement at the mercy of an armed and dangerous suspect's subjective decision as to when he will provide further corroboration of the dispatch by using his concealed weapon. Requiring an inquiry at such time for further corroboration ignores the gravity of the risk in comparison to the minimal intrusion.

In Adams v. Williams, 407 U.S. 143 (1972), this Honorable Court rejected the necessity of corroborating a known informant's tip, who had not evidenced reliability, for there to be a sufficient basis for a law enforcement officer to execute a limited protective search. In the instant cause, the Florida Second District failed to follow this Honorable Court's decision in Adams v.

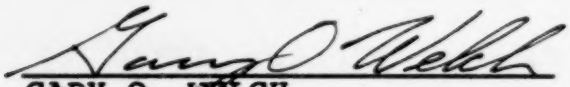
Williams, supra. As such, petitioner would request this Honorable Court to grant the petition for writ of certiorari and summarily reverse the decision of the Florida Second District Court of Appeal.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Honorable Court grant the petition for writ of certiorari and summarily reverse the decision of the Florida Supreme Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



GARY O. WELCH
Assistant Attorney General
1313 Tampa Street, Su. 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I GARY O. WELCH counsel for petitioner and a member of the Bar of the United States Supreme Court, hereby certify that on the 18th day of March, 1987, I served three copies of the Petition for Writ of Certiorari to the Supreme Court of Florida on Deborah K. Brueckheimer, Assistant Public Defender, 455 North Broadway, Hall of Justice Building, Bartow, Florida 33830 by a duly addressed envelope with postage prepaid.

GARY O. WELCH
Assistant Attorney General
COUNSEL FOR PETITIONER

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF FLORIDA,

Petitioner,

v.

ROBERT STRONG,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ROBERT STRONG,

Appellant,

v. CASE NO. 85-2827

STATE OF FLORIDA,

Appellee.

Opinion filed August 13, 1986

Appeal from the Circuit Court
for Pinellas County;
Crockett Farnell, Judge.

James Marion Moorman, Public
Defender, Bartow and
Deborah K. Brueckheimer,
Assistant Public Defender,
Clearwater, for Appellant.

Jim Smith, Attorney General,
Tallahassee and Gary O. Welch
Assistant Attorney General,
Tampa, for Appellee.

RYDER, Judge.

Robert Strong appeals the trial court's denial of his motion to suppress. We reverse.

The state charged appellant with carrying a concealed firearm contrary to section 790.01(2), Florida Statutes (1985). Appellant pleaded not guilty and filed a motion to suppress.

At the hearing on the motion, the officer testified that he had received a dispatch that an anonymous caller had stated that there was a black male wearing dark clothing with a handgun at a particular convenience store. When the officer arrived at the store two to three minutes later, he saw two black males sitting on the curb. Because appellant's clothing was darker than the other black male's clothing, the officer approached appellant and asked if he had a gun. Appellant stated he did not, but the officer asked him to stand up for a pat-down. The pat-down revealed a small handgun in appellant's rear pocket. The officer then placed appellant under arrest.

The trial court denied appellant's motion to suppress, stating that the second district's opinion in Williams v State, 454 So.2d 737 (Fla. 2 DCA 1984) was distinguishable in that the anonymous tip in appellant's case involved a firearm. The court then cited Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). After the denial of his motion, appellant changed his plea to nolo contendere and reserved the right to appeal the suppression issue.

The pertinent facts in this case are very similar to those in Williams, 454 So.2d at 737, in which we held that an anonymous tip that a tall, black man was selling marijuana in front of a particular bar was too vague to have provided a founded suspicion for the stop. In this case, the anonymous tip that a black man in dark clothing had a handgun at a particular location was no more specific than that in Williams.

Additionally, as in Williams, there were no corroborating circumstances to indicate that appellant was involved in suspicious activity. Appellant was one of two men sitting on the curb in front of the convenience store when the officer arrived. The officer approached appellant because he was wearing dark-colored clothing and the other man was wearing light-colored clothing. Although appellant fit the general description of the anonymous tip, that description could have fit many men. See Ross v. State, 419 So.2d 1170 (Fla. 2 DCA 1982) (radio dispatch describing black male with short-cropped hair wearing white tee shirt and blue jeans was general; clothing description was not unusual or distinctive; stop not justified). Cf. State v. Hetland, 366 So.2d 831, 833 (Fla. 2 DCA 1979), approved, 387 So.2d 963 (Fla. 1980) (anonymous tip that named individual described as white male, six feet tall,

dirty, shoulder-length hair, full beard and mustache, wearing tank shirt, denim pants and blue denim jacket on his way to a specified bar while carrying a silver revolver with a black handle was specific; stop valid).

In Hetland, we stated that although an anonymous tip can be the basis of a valid stop, not every stop based on such a tip is always valid. Id. at 838. Factors to consider include the specificity of the information. A vague description does not justify an officer in stopping every individual who might possibly fit that description. Id. at 839. In this case, the description of a black man wearing dark clothing was too vague under Williams, Ross and Hetland.

The trial judge ruled that this case is distinguishable from Williams because it involved a firearm and cited Terry, 392 U.S. at 1, 88 S.Ct. at 1868, 20 L.Ed.2d at 889 to support this reasoning. Under Terry, a

police officer may conduct a frisk for weapons if the officer has reason to believe the person is armed and dangerous. However, the reasons to frisk must be based upon specific reasonable inferences surrounding the circumstances of the case. Terry's recognition of an officer's need to frisk for weapons in certain circumstances did not justify the officer's reliance on a vague anonymous tip to stop and frisk appellant in this case. Without other corroborating circumstances or indicia of reliability to ensure that appellant was actually the person described in the tip, and without personally observing any suspicious activity by appellant, such as in Terry, the officer could have no founded suspicion that appellant had a gun.

Contrary to the state's argument, the facts in this case are not analogous to Lightbourne v. State, 438 So.2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct.

1330, 79 L.Ed.2d 725 (1984). In Lightbourne, the justification for the pat-down was the defendant's furtive movements and nervous appearance during police questioning. In appellant's case, there is no evidence that the officer conducted the pat-down other than the fact that appellant fit the general description of the anonymous tip. But for that tip, the officer would have had no other reason to suspect appellant was in possession of a concealed firearm. Even if the stop could be justified as a consensual encounter, "[a] valid stop does not necessarily mean that there can be a valid frisk." State v. Webb, 398 So.2d 820, 822 (Fla. 1981). In this case, the stop was invalid and the pat-down was not the result of any reasonable grounds to believe appellant was armed and dangerous which might have developed during any consensual questioning. The trial court erred in denying appellant's motion to suppress.

Reversed and remanded with instructions to vacate appellant's conviction.

DANAHY, C.J., and FRANK, J., Concur.

SUPREME COURT OF FLORIDA

THURSDAY, JANUARY 22, 1987

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 69,604

ROBERT STRONG, District Court of Appeal
Second District

Respondent. No.85-2827

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. app. P. 9.330(d).

ADKINS, EHRLICH, SHAW and BARKETT, J.J., concur
MCDONALD, C.J., dissents

cc: Hon. William A. Haddad, Clerk
Hon. Karleen F. DeBlaker, Clerk
Hon. Crockett Farnell, Judge

Gary O. Welch, Esquire
Deborah K. Brueckheimer, Esquire